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in the

Supreme Court

of the

United States

BASS AVIATION, INC.,

Petitioner,

vs.

MARGARITA HERNANDEZ, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the exercise alternatively of specific jurisdiction or general jurisdiction by Florida courts over a nonresident corporation which sold and leased aircraft in Florida, advertised and solicited aircraft business regularly in Florida, and leased the particular aircraft involved in this suit to a Florida lessee, following which a crash occurred in Haiti while the aircraft was en route from Florida to Haiti, satisfies constitutional due process standards for a cause of action against the corporation arising from the alleged negligent maintenance of the aircraft, negligent failure to warn of its unairworthy condition, and vicarious liability as lessor of the dangerous instrumentality.

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No. 84-1599

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Respondent Linda Moyer (hereinafter Moyer) respectfully submits that the Petition for a Writ of Certiorari should be denied.

SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the contacts described in the Petition of Bass Aviation, Inc. (hereinafter Bass), Bass maintained a toll-free WATS telephone line for incoming business calls from Florida. (Pet. App. 28a).

Among its Florida dealings Bass conveyed two jet aircraft through a 10-year lease/purchase agreement to Bill Tougas, a Florida resident who operated out of Fort Lauderdale. (Pet. App. 24a).

Dealing through a Florida resident, Shelton Mintzberg, Bass sold a jet aircraft to Marine Holdings Ltd., a Florida corporation. That aircraft was delivered by Bass in Florida to its customer and operated in Florida under Bass' Part 135 Air Taxi Operators and Commercial Operators Certificate issued by the Federal Aviation Administration. (Pet. App. 4a, 5a). Under a Part 135 Certificate, the certificate holder (Bass) retains operational control of its aircraft and retains a non-delegable duty to assure the proper maintenance of its aircraft regardless of the aircraft's whereabouts. The provisions of 14 C.F.R. §§135.77, 135.413 are included in the Appendix at App. 1.

Bass began its jet lease/charter operation in 1976. According to Bass' President, "[I]n '78—about '78 we

were the price-setters in the Lear Jet market, and we probably moved as many or more than anyone in the country, really." (App. 2, 3). Obtaining that prominence in the national Lear Jet market occurred as a result of handling a total of about thirty Lear Jets from 1976 through mid-1980. (App. 2, 3).

Bass advertised regularly in the "A/C Flyer" from 1977 through the time of the accident in 1980. The nationwide advertisements placed by Bass in the "A/C Flyer" were arranged by phone calls made to the "A/C Flyer" office in Fort Lauderdale, Florida, and Bass made payment on invoices submitted from and payable to the "A/C Flyer" in Florida. (Pet. App. 24a, 28a).

The lease agreement for the flight in question included a choice of law clause, but the lease contained no agreement as to choice of forum in the event of suit and contained no territorial restriction as to where the leased Lear Jet could be operated. (Pet. App. 48a). The lease was for a term of one week and provided for a cash payment of $10,000.00 in advance. (Pet. App. 48a).

At the time that the pilot Charles Moyer picked up the plane, Bass also gave him a proposed long-term lease agreement for the aircraft, which Charles Moyer was to deliver to his employer for review and possible signature. (App. 3, 4). Charles Moyer's employer operated aircraft principally out of Florida and the Bahamas. (Pet. App. 4a).

Moyer disputes Bass' conclusory statement that the cause of action arose in Haiti and that the cause of action did not arise out of or relate to any conduct of Bass in Florida. These causes of action for wrongful

death arise alternatively from Bass' failure to maintain the aircraft, Bass' continuing breach of a duty to warn the crew of its unairworthiness, and Bass' continuing liability as lessor of the dangerous instrumentality, all of which caused injury to Florida resident survivors of Florida resident decedents. (Pet. App. 12a, 13a, 16a, 17a).

SUMMARY OF ARGUMENT

The decision below was consistent with the body of law describing the sufficient minimum contacts necessary to support either general or specific jurisdiction over a nonresident defendant. There is no question of law that warrants a grant of certiorari.

ARGUMENT

The decision below was rendered in accord with a well-settled body of law derived from the rule that suit may be maintained against a nonresident defendant if the defendant has certain minimum contacts with the forum and the maintenance of the suit does not offend "traditional notions of fair play and substantial justice", *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Moyer and Hernandez have relied extensively upon assertion both of specific and general jurisdiction below. As demonstrated by the numerous relevant contacts of Bass in Florida, there is no justiciable issue as to its voluntary submission to the jurisdiction of Florida courts, both in the extent of its general business contacts and in relation to the leasing of the subject aircraft for use in Florida.

A. Contacts Between Bass and the Forum

Bass was engaged in the business of selling, chartering and leasing corporate jet aircraft, particularly Lear Jets such as the one involved in this accident. The leasing and sale of Lear Jets is not the sort of volume business which exists in the instance of leasing automobiles, for example, but the lease or sale of a single Lear Jet may be a highly lucrative transaction. The one week lease involved in this case required a minimum payment of $10,000.00. It may fairly be said that a $10,000.00 rental fee for a one week lease involves a substantial transaction. Bass' president testified that they were the "price-setters" in the Lear Jet market, and that they handled as many or more Lear Jets as anyone in the country during 1978. Even so, Bass handled only approximately thirty Lear Jets between 1976 and mid-1980. Even a single transaction in Bass' business of selling and leasing corporate jets had a major impact in this highly priced, limited market.

Bass served the Florida corporate jet lease market extensively. It advertised aircraft regularly in the "A/C Flyer", a monthly nationwide advertising publication printed in Florida. Bass placed its ads through the "A/C Flyer's" business office in Ft. Lauderdale, Florida, and Bass paid the "A/C Flyer's" billing invoices at Ft. Lauderdale, Florida. Bass also maintained a toll-free WATS telephone line for incoming business calls from Florida. As a result of Bass' efforts to penetrate the Florida jet aircraft market, it had leased jet aircraft on prior occasions which were piloted by the decedent Charles Moyer, whom Bass knew to be a Florida resident piloting principally in Florida and the Bahamas.

Bass had entered into a 10-year lease/purchase of two jet aircraft with a Florida resident. Bass had permitted another Florida purchaser to operate an aircraft under Bass' Part 135 Air Taxi Operators and Commercial Operators Certificate issued by the Federal Aviation Administration. Under 14 C.F.R. §§ 135.77, 135.413, Bass was required to retain operational control of that aircraft and Bass was required to retain a non-delegable duty to assure proper maintenance of that aircraft, even while it was used in Florida by the Florida purchaser. Bass had delivered that aircraft in Florida to its Florida customer.

Bass' principal place of business in Fairhope, Alabama, was so close geographically to Florida that one of Bass' employees lived in Florida and commuted to work at Bass.

In its air charter operations, in which Bass furnished pilots and fuel, aircraft owned by Bass had flown to Florida carrying Bass' customers, and Bass had purchased fuel in Florida for its aircraft while there.

B. Specific Jurisdiction

The facts of this case fall within those anticipated by the Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In that case, the defendant distributors sold only to customers in New York, New Jersey and Connecticut. In distinguishing that limited activity from the distribution of the product in the forum State, Oklahoma, the Court stated:

> Hence, if the sale of the product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subect it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or others. The forum State does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare *Gray v. American Radiator and Standard Sanitary Corporation*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

444 U.S. at 297, 298. Although this crash did not occur within Florida, the incident occurred while the aircraft was still en route from Miami to Port-au-Prince, Haiti, and the mere fortuity of the location of the crash in this instance should do nothing to alter the rule set forth in *World-Wide Volkswagen Corp.* above.

The inquiry into whether a foreign corporation is subject to the jurisdiction of the forum State focuses upon the relationship among the defendants, the forum and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). In this instance, Bass leased the aircraft in the custody of a Florida resident pilot, Charles Moyer, knowing that he was going to fly the aircraft to Florida, and the crash occurred while the aircraft was being flown from Florida. The decedents Charles Moyer and

Rafael Hernandez and their survivors are all Florida residents. The relationship of the defendant, the forum and the litigation all dictate that the contacts of this defendant be sufficient.

The fundamental rule set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), has been satisfied in this action. In *International Shoe*, the Court stated:

> To the extent that a corporation exercises the privilege of conducting activities within a State, it enjoys the benefits and protection of the laws of that State. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319. Bass leased a dangerous instrumentality with the foreknowledge that it would be flown to Florida by a Florida resident crew. The pleadings below averred that Bass (1) negligently maintained the aircraft; (2) negligently failed to warn the decedent crew members of its unairworthy condition; and (3) was vicariously liable as owner of the dangerous instrumentality for the negligence claimed by each crew member against the other. Although transitory torts may be frowned upon for some purposes, the wrongful acts in (1) and (2) above, occurred in Florida as well as elsewhere, and the liability claimed in (3) arose during the flight from Florida prior to arrival at the aircraft's scheduled

destination. An assertion of specific jurisdiction is proper under these circumstances.

C. General Jurisdiction

Even if this crash is assumed neither to have arisen out of or be related to Bass' Florida contacts, jurisdiction is proper. It is not required that a cause of action arise out of a defendant's business transactions in the forum State. *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).

If the cause of action does not arise out of or relate to the defendant's activities in the forum State, then there must be shown continuous and systematic business contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868 (1984).

Bass was involved in regular, monthly advertisements published by a Florida magazine and intended to reach Florida. Bass maintained a toll-free WATS telephone line for incoming business calls from Florida. Bass had leased jet aircraft to the decedent Charles Moyer's employer for use in Florida on prior occasions. Bass had chartered aircraft for flights to Florida, for which Bass had purchased aircraft fuel in Florida. Bass had entered into a ten year lease/ purchase of two jet aircraft with a Florida customer. Bass permitted a buyer to operate in Florida under Bass' own Part 135 Air Taxi Operators and Commercial Operators Certificate issued by the Federal Aviation Administration, under which Bass retained operational control of the aircraft and a non-delegable duty to assure the maintenance of that aircraft, even while that aircraft was located in Florida. Bass had delivered that aircraft in Florida to

its customer. The business of leasing, selling and chartering multi-million dollar corporate jet aircraft is not so mundane or common an enterprise that these extensive dealings in Florida may be characterized as merely incidental. Bass sought to penetrate the market for corporate jet aircraft in Florida and did so in a continuous and systematic way.

Recent rulings of the Court have addressed directly whether the defendant challenging jurisdiction had contact with the forum State by soliciting business in the forum State or by seeking to serve its market. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, 1871 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289, 295 (1980). This type of contact is of paramount importance, because it reflects directly whether the Defendant may reasonably be assumed to have availed itself of the privilege of doing business in the forum State and thus may reasonably expect to be haled into court in that State. *Calder v. Jones*, 104 S.Ct. 1482, 1487 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 297; *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978): *Shaffer v. Heitner*, 433 U.S., at 216; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Bass avidly sought business in Florida, and having successfully obtained it, cannot reasonably be heard to complain that its constitutional rights have been denied.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May 7, 1985

CERTIFICATE OF SERVICE

I, Michael K. McLemore, being over the age of 18 years, and a member of the law firm of Kimbrell & Hamann, P.A., hereby certify that I have this seventh day of May, 1985, served three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Fourth District Court of Appeal of Florida and upon the following parties by mailing same to their attorneys of record in sealed envelopes, first class postage prepaid, deposited at the United States Postal Service Mailbox located at 799 Brickell Plaza, Miami, Florida: THOMAS J. WHALEN, ESQ., Counsel for Petitioner, BASS AVIATION, INC., 1100 15th Street, N.W., Suite 300, Washington, D.C. 20005; THOMAS R. TROMPETER, Casuso & Trompeter, Attorneys for MARGARITA HERNANDEZ, 7900 S.W. 57th Avenue, Suite 22, South Miami, FL 33143; LOUISE H. McMURRAY, Daniels and Hicks, P.A., 1414 duPont Building, 169 E. Flagler Street, Miami, FL 33131; and EDWARD R. CURTIS, 3104 South Andrews Avenue, Ft. Lauderdale, FL 33316 (Co-Counsel for Linda Moyer); JOHN M. MURRAY, Thornton, David & Murray, P.A., Attorneys for GATES LEARJET CORP. Suite 210, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131; JOHN R.W. PARSONS, Peters, Pickle, Flynn, Niemoeller, and Downs, Attorneys for THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, 628 Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131; and JOANNE M. ROSE, Squires, Sanders & Dempsey, Attorneys for Margarita Hernandez, 3000 Miami Center, 100 Chopin Plaza, Miami, Fla. 33131.

/s/ Michael K. McLemore

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14 C.F.R. §135.77

* * *

§ 135.77 Responsibility for operational control.

Each certificate holder is responsible for operational control and shall list, in the manual required by §135.21, the name and title of each person authorized by it to exercise operational control.

* * *

14 C.F.R. §135.413

§ 135.413 Responsibility for airworthiness.

(a) Each certificate holder is primarily responsible for the airworthiness of its aircraft, including airframes, aircraft engines, propellers, rotors, appliances, and parts, and shall have its aircraft maintained under this chapter, and shall have defects repaired between required maintenance under Part 43 of this chapter.

(b) Each certificate holder who maintains its aircraft under §135.441(a)(2) shall—

(1) Perform the maintenance, preventive maintenance, and alteration of its aircraft, including airframe, aircraft engines, propellers, rotors, appliances, emergency equipment and parts, under its manual and this chapter; or

(2) Make arrangements with another person for the performance of maintenance, preventive maintenance, or alteration. However, the certificate holder shall ensure that any maintenance, preventive maintenance, or alteration that is performed by another person is performed under the certificate holder's manual and this chapter.

* * *

Excerpts of Deposition of Phillip W. Bass, taken November 22, 1982, which appears in record below at pp: 153-332.

Deposition, p. 101, l.1 (R.253):

* * *

Q How many Lear Jets pass through the portals of Bass Aviation?

A God, I would have to guess without any records.

Q Don't guess. But give me an educated guess or an estimate, if you're able to.

A Some we never even took possession of. Some we made a commitment to buy and the next day they were gone. I'd say maybe fifteen, twenty Lear Jets.

Q That's from July '76 until what, the present?

A Oh, no. In '77. Maybe '77 that many. One year.

We were told that we had basically one of the in '78—about '78 we were the price-setters in the Lear Jet market, and we probably moved as many or more than anyone in the country, really.

Q Okay. Let me see if I can clarify my original question a little bit. From the time that you began your business until the present time, how many Lear Jets, to the best of your knowledge, had you had any dealings with either on a sales basis or a lease basis?

MR. PARSONS: I don't want you to guess. If you can give some reasonable figure based on your knowledge, that's fine. But don't guess.

A Thirty, I guess, as best as I can estimate.

* * *

Deposition, p. 146, l.16 (R.198):

* * *

Q With regard to the long-form written lease that's Exhibit 16, was that lease ever signed by anyone?

A That lease was given to Mr. Moyer just prior to his departure from Fairhope. It was given to him on the basis—at further discussion he said, "We're going to probably sell the 65 and we may need the aircraft for a longer period of time."

I said, "Okay. If we're going to do that, take the long form, the financials. Let's get it all filled out, put it

on record so we can look at some long term on the aircraft.

Q In any event, the long form document on number 16 was a working document that was to be further reviewed and decided?

A He said that he did not have the authority to enter into a long-term agreement like this without his attorney looking at it, and I said, "Fine," and he was going to bring it back the next week as he came through Alabama.